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IN THE

Supreme Court of the United States

October Term, 1946

No. 1002

D. M. W. CONTRACTING CO., INC., HARTFORD ACCIDENT AND INDEMNITY COMPANY AND AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

C. R. STOLZ, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Supreme Court of the United States:

C. R. Stolz, by his attorneys, answering the petition filed herein by D. M. W. Contracting Co., Inc., Hartford Accident and Indemnity Company and Aetna Casualty and Surety Co. for a writ of certiorari, respectfully represents as follows:

PRELIMINARY STATEMENT

Petitioners' "Statement of Matters Involved" is inaccurate and misleading in several respects.* Throughout petitioners' Statement liberal and profuse citations are made to their own Exceptions to Auditor's Report (76-94), as a substitute for the actual record.

However, for our purposes a fair and concise statement of the case may be found in the opinion of the Court of Appeals (115-117), which is based upon the pleadings and orders of the trial court (1-29), the report of the auditor (29-75), and the judgment of the trial court (96-97).

ARGUMENT

(1) This is a contract action. The opinion of the United States Court of Appeals for the District of Columbia clearly and distinctly sets forth the facts and the law in support of the conclusion reached, and there is no valid ground to support petitioners' application for review of the decision reached by the two lower courts other than the usual disappointment attending an adverse ruling.

(a) There is no federal question presented here, nor have the lower courts decided the case contrary to applicable decisions of this Court.

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* *For example:* At page 3 of the Petition it is stated that "Stolz' counsel verified by direct telephone to Woolin that he was unable to testify," which is directly contrary to fact and without basis in the record as such. On page 4 petitioners state "At the same time, the District Judge directed Stolz' counsel, if he were not satisfied with Woolin's sworn statement, to propound interrogatories to Woolin", which is without warrant in the record and contrary to the order of the trial court (23), since by that order the witness was to appear and testify if petitioners had so desired. At page 5 petitioners omit other relevant portions of the record, not a part of the transcript, to suit their own purposes. On the basis of the present record, however, petitioners' attempt to color the statement of facts is of no great moment.

(b) There is no conflict with decisions of other circuit courts of appeal; there is no important question of local law in conflict with applicable decisions; the decisions of the two lower courts are not in conflict with the weight of authority; there is present no important question of federal law which has not been, but should be settled by this Court; and there is no call for an exercise of this Court's power of supervision since no showing is made that the lower courts have departed from the accepted and usual course of judicial proceedings.

(c) There is no question of general importance, or any question of substance relating to the construction or application of the Constitution or any statute of the United States.

In short, there are no special or important reasons why this Court should grant a writ of certiorari here.

(2) This case was originally referred to the auditor of the district court who, we may assume, is a standing master under Rule 53 (a) of the Federal Rules of Civil Procedure. No special appointment was made; the reference was ordered on the court's own motion to which no objection was interposed by the parties.

Despite the delays caused by petitioners' actions below, the respondent's case was fully established before the auditor and the trial court, and every reasonable opportunity was afforded petitioners to adduce proof on their own behalf. Of importance to note is the fact, which affirmatively appears throughout the record, that petitioners had ample opportunity, at every stage of the case, to produce and offer relevant and competent testimony on their own behalf; *but, not once did petitioners ever avail themselves of such opportunity—indeed, no request was ever made by them to present any evidence—between the commencement of the hearings on October 17, 1944 and the date of the final judgment on December 19, 1945, a period of more than 14 months.*

The original order of reference was never objected to; the fact is that petitioners participated in the hearings without objection thereto, and it was only after the death of the first auditor, after the hearings had been concluded, that the thought perhaps occurred to petitioners that it would likely be feasible to institute objections on the chance that respondent would be compelled to start all over again, thus preventing a final determination for another considerable length of time. The trial court very properly refused to become a party to such dilatory tactics; especially since petitioners refused to produce evidence by the personal appearance of their witnesses or through the use of their depositions.

It matters not, therefore, whether the officer who reported the evidence heard or saw the witnesses, since **(a)** the issues were neither controverted nor disputed, **(b)** the petitioners failed to offer evidence available to them, and **(c)** the trial court, before whom the case always remained, gave careful consideration to the entire proceedings and evidence, and heard the case anew, upon the record and proceedings so made, before arriving at its own independent conclusion and judgment. (*Smith v. Brown,* (CCA 5, 1925) 3 F (2d) 926).

The cases cited by petitioners in support of their arguments are either inapplicable or clearly distinguishable, and it would serve no useful purpose to review those authorities here, since the matters argued by them in their Points I, II and IV were carefully considered and reviewed by the two lower courts.

(3) Petitioners' arguments in connection with the trial court's instructions to the successor auditor were all presented to the lower courts. The query seems to be this: Was the lower court required to compel respondent again to present his case and evidence, merely that the auditor might re-state and file another report on respondent's uncontradicted and undisputed testimony? No practical

or logical reasons are advanced by petitioners to support their position. In either event it is the court (who neither sees the witnesses nor hears the testimony) making the final determination. Where the evidence in a particular case is sharply conflicting and the master must consider the testimony in the light of his observations of the witnesses, their bearing and demeanor on the stand in order to weigh and resolve doubts as to the credibility of witnesses, perhaps it might be preferred that the auditor should see and hear the witnesses. However, even in such cases this Court has held that a master is not required to see and hear witnesses himself, but if he does not the court must carefully scrutinize and examine his report. See: *Louisiana v. Mississippi* (282 U. S. 458, 465; 75 L. Ed. 459), involving much conflicting testimony, where this Court stated:

> "Mindful of the fact that the special master did not see and hear the witnesses, we have felt it incumbent upon us to study the proofs, documentary and oral, to examine the deductions made therefrom, and thereby to test the stated conclusions. The preponderance of the evidence supports the master's findings. * * *"

In the instant case the trial court carefully examined and studied the entire case arriving at the same conclusions as the auditor; and its decision has been affirmed by the court of appeals. The applicable authorities all support the action of the trial and appellate court.

In re Wray, 233 Fed. 418
O'Grady v. Chautauqua Builders Supply Co., 33 F (2d) 957

Amundson v. Clos, 271 Ill. 209; 110 N. E. 914
Coel v. Glos, 232 Ill. 142; 83 N. E. 529

There is no need to place any strained or confused construction upon Rule 52 of the Federal Rules of Civil Procedure, as petitioners attempt to do. The following language of the court of appeals is clear:

"It appears from the foregoing that it is the trial court in such a case who makes the final determination of all the issues. The report of the master is advisory only and is without effect until confirmed by the court. For while he is charged with accepting the master's findings of fact unless clearly erroneous, it is necessary for him to review the transcript of the proceedings to determine if such error has been made, and when objection is taken to the report, as was done here, he is bound to review the transcript of the proceedings, evidence and exhibits to determine for himself whether the master's report should be accepted, rejected wholly or partly, modified, recommitted with instructions, or whether he should receive further evidence. And in no instance is he bound by the master's conclusions of law. The effect is the same whether or not the parties consented to the reference." (117)

(4) The provisions of Section 16-1718 of the District of Columbia Code (1940) were called to the attention of the two lower courts. Petitioners continue to misconceive the function and purport of that code section. It has to do solely with the special type of *consent* reference in the nature of award proceedings, which clearly never had any bearing to this situation. (Cf. *Ex Parte Peterson*, 253 U. S. 300; 64 L. Ed. 919). The original order of reference was made by the court, and was never objected to by petitioners. It was a reference under the Federal Rules of Civil Procedure. Subsequently, and after the death of the first auditor, the court directed his successor to file an advisory report on the basis of the record already made. This was done, and upon review the court arrived at its independent conclusions, confirming the report of the auditor. Petitioners have no cause to complain. They were allowed their full day in court.

(5) Petitioners' belated attempt to raise some question about the propriety of the trial court's order instructiong the successor auditor to file an advisory report based upon the evidence taken and reported is likewise without

merit. They now claim that "There was no exceptional condition requiring a reference at the time the District Court directed the reference to the second Auditor. . . ." They raised no such question or objection when respondent moved to close the hearings or, in the alternative, to recall the case from the auditor (16), but now attempt to say that there were no longer complicated issues to be determined. They completely overlook the fact that the case had been heard, upon oral and documentary evidence; that they never offered any testimony; and that the only thing remaining was the filing of a report based upon the record already made. Moreover, this point of contention is being raised here for the first time. Petitioners never previously complained of the so-called reference to the successor auditor on this ground. It is entirely lacking in merit.

(6) Petitioners misconceive the purpose of Rule 10 of the district court. That rule simply stated is one by which the trial court may determine, in its sound discretion, whether a proper showing has been made to justify a continuance and, if such had been the case, the court would have afforded opposing counsel an opportunity to stipulate to relevant testimony, otherwise a further continuance may have been granted. That affidavit which petitioners submitted is not a part of the record here. However, it was highly objectionable not only to respondent but to the court as well. The point is that, after this affidavit was filed, the trial court determined there had been no proper showing to warrant the court in granting any further continuance, and the case was ordered concluded. Apparently petitioners indirectly are complaining about the refusal of the trial court to order any such further continuance; but, as stated by the District Court of Appeals (116):

> "The case was continued from time to time until the appellee (respondent here) showed to the court's

> satisfaction that the D.M.W.'s witness's failure to appear was due to an unwillingness to testify rather than to an inability, whereupon the court ordered the auditor to conclude the cause."

Petitioners are hardly in a position to complain of their own dereliction.

(7) Petitioners' argument that they have been deprived of property without due process and in violation of the Fifth Amendment is without foundation. This contention was not raised or argued below. Moreover, this litigation extended for a period of 19 months before the trial court; petitioners were represented by resourceful counsel at every step; they had full notice and every opportunity to be heard throughout the proceedings; they have quite throughly litigated the issue, with adverse results; and they have suggested no reason for further review.

CONCLUSION

This case can hardly be of any special importance to any one other than the immediate parties. Petitioners had ample opportunity to present their views to the lower courts, both in briefs and oral arguments, and careful consideration was given to all points properly presented. Both courts have ruled against petitioners who, by their dilatory tactics, have been successful in depriving respondent of the fruits of his labor for more than five years. It is time this litigation was drawn to a final close.

It is respectfully submitted that the petition for writ of certiorari presents no sound reason for the exercise of this Court's plenary power, and the petition should be denied.

Respectfully submitted,

OLIVER F. BUSBY
MAURICE FRIEDMAN
Counsel for Respondent